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IN THE

Supreme Court of the United States

October Term 1991

CONSTRUCTIVIST FOUNDATION, INC., F/K/A
LEE FOUNDATION, INC.,

Petitioner,

v.

DEKALB COUNTY BOARD OF
TAX ASSESSORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does Georgia Statute O.C.G.A. Sec. 48-5-29(a), which requires aggrieved taxpayers to pay their ad valorem property taxes before the Superior Courts of Georgia will assume jurisdiction in the judicial appeal of the assessment of those taxes, deprive impoverished entities claiming tax exempt status of their Constitutional Rights?

A. Does O.C.G.A. Sec. 48-5-29(a) deprive impoverished entities claiming tax exempt status of their due process rights in violation of the Fourteenth Amendment by unnecessarily burdening them with the prereview payment requirement?

B. Does O.C.G.A. Sec. 48-5-29(a) create an undue burden depriving impoverished entities claiming tax exempt status of the opportunity to appeal their ad valorem tax assessment in violation of the Equal Protection Clause of the Fourteenth Amendment?

II. Does notice by publication of court proceedings, as permitted by Georgia Uniform Superior Court Rule 8.3, meet the Due Process standards for out-of-state, pro se litigants whose addresses are known to the court and the parties?

LIST OF PARTIES AND RULE 29.1 STATEMENT

1. Constructivist Foundation, Inc., F/K/A/ Lee Foundation, Inc.

2. DeKalb County Board of Tax Assessors

* Pursuant to S. Ct. R. 29.1, Petitioner The Constructivist Foundation is a Georgia, nonprofit Foundation which has no parents, affiliates or subsidiaries. The Foundation has its local office in Potomac, Maryland.

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CONSTRUCTIVIST FOUNDATION, INC., F/K/A LEE FOUNDATION, INC.,

Petitioner,

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DEKALB COUNTY BOARD OF TAX ASSESSORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, the Constructivist Foundation, F/K/A Lee Foundation, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above-entitled proceeding on 27 November 1991.

DECISIONS BELOW

On 8 April 1991 the DeKalb County Superior Court dismissed with prejudice Petitioner/Foundation's appeal of its ad valorem real property tax

assessment for tax year 1990. The rationale for the dismissal, according to the order of dismissal, was first, Petitioner/Taxpayer's failure to pay its disputed taxes in accordance with O.C.G.A. Sec. 48-5-29 (a), and second, because Petitioner/Taxpayer, which had notice neither of the Motion to Dismiss nor of the hearing on the motion, failed to make an appearance at that hearing. (see Appendix.)

Petitioner appealed the dismissal to the Supreme Court of Georgia, raising the same Constitutional issues which it presents in this Petition. On 27 November 1991 the Supreme Court of Georgia affirmed the judgment below, without rendering an opinion. (see Appendix.)

On 18 December 1991 Petitioner's Motion for Reconsideration was denied, again without an opinion although one was requested. (see Appendix.)

JURISDICTION

On 8 April 1991 the Superior Court of DeKalb County, Georgia dismissed Petitioner's tax appeal.

On 27 November 1991 the Supreme Court of Georgia affirmed the dismissal below.

On 18 December 1991 the Supreme Court of Georgia denied Petitioner's Motion for Rehearing.

On 2 March 1992 Justice Anthony M. Kennedy granted Petitioner's application for an extension of time to file its petition for writ of certiorari, extending the time to and including 26 April 1992.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (a) (1988).

STATUTES INVOLVED

The Constitutional provisions, statutes and ordinances involved are reprinted in the attached Appendix. The citations are as follows: U.S. Const. Amendments V and XIV; 47 Stat. 1474, as amended, 49 Stat. 911, 11 U.S.C. Sec. 205, Sec. 77(c)(8) (1935); 28 U.S.C. 1257(a) (1988); U.S. Supreme Court Rule 29.1; Ga. Statute O.C.G.A. Secs. 48-5-29(a)(1981), and 48-5-311(f)(1) (1991); Ga. Uniform Superior Court Rule 8.3 (1985).

STATEMENT OF THE CASE

The Constructivist Foundation, F/K/A Lee Foundation, is a private, nonprofit Georgia Corporation, which was established on 18 March 1963 for educational purposes. The Foundation's corporate activities and purposes now include educational, scientific, literary, artistic, medical, religious, welfare and other charitable activities, including assisting other similar charitable organizations. The corporate headquarters of the Foundation are now located in Potomac, Maryland. The Foundation has had U.S. and State of Georgia tax exempt status continuously since its incorporation.

Among the Foundation's corporate assets is a ten plus acre parcel of land improved by a 22,000 sq. ft. school building located in DeKalb County, Georgia. This property (zoned .5 acre single family residence with a special use for the school), which the Foundation has owned since November 1965, was initially leased by a private, nonprofit, early childhood school and day care center. This school was the first integrated, inter-denominational, Montessori

school in Georgia. The DeKalb County Tax Board granted an exemption under Georgia law to the Foundation from ad valorem taxes on subject property starting in 1965.

The nonprofit school was closed in 1976 for lack of funds. After June of 1977 the property was leased briefly to a private, profit making school, whereby the exemption from ad valorem taxes ceased. Then, from December 1978 until 1985, the property was again leased to a nonprofit school. Nonetheless, real estate taxes amounting to approximately $6,000.00 per year were still being assessed by the County, the Foundation paying them under protest.

From 1 February 1985 to late 1987 the Foundation leased, at subsidized rates, part of the site to Faith Cornerstone Corporation, an Evangelical church with both U.S. and State of Georgia tax exempt status. The Foundation stored its educational equipment on the remaining portion of the property and allowed the Church to use some of that equipment for its educational programs. Still the applications by the Foundation for exemption from ad valorem property taxes were denied because the DeKalb County tax commissioner considered the lease primarily as income production activity by the Foundation. The annual ad valorem tax bill for the property, at that point, was approximately $9,000.00.

Starting in 1988, the same Church used part of the property in exchange for sharing the expenses for the upkeep of the property with the same use of the educational equipment. Still, the Foundation's application for at least a partial exemption, if not a complete exemption, from ad valorem taxes for the 1988 tax year was denied. Instead the tax value doubled to over $1,600,000.00, and the tax bill in-

creased to $29,906.16.

The exemption was again denied in 1989, and after the Foundation exhausted all of its administrative procedures with regard to its 1989 ad valorem tax bill, it appealed that assessment to the Superior Court of DeKalb County, Georgia. At this point the Foundation, which could not afford to hire an attorney, was proceeding pro se, and the Court dismissed the appeal for delay in filing the brief. The motion for a rehearing was denied.

The County tax assessors had stated that the request for exemption from the 1989 assessment was denied because aiding religious activity was not included among the nonprofit activities authorized in the Foundation's initial charter. Therefore, in 1989 the Foundation amended its charter to include any type of charitable activity, including religious activity. Nevertheless, the Foundation's application for an exemption from its 1990 ad valorem taxes was denied, and taxes were assessed based on a new higher valuation of the property of $1,623,500.00.

The Foundation appealed the 1990 assessment to the DeKalb County Board of Tax Assessors arguing that the property qualified for an exemption from ad valorem taxes under Georgia law because 1) it was not making a profit on the church's contributions to the upkeep of the property but rather was subsidizing the Church by proving space at 30% of value, and 2) that at least the 50% portion of the property, where the Foundation stored and had its educational materials used, qualified for an exemption. In the alternative, the Foundation showed that the valuation was excessive because 1) the value of the property was diminished by at least 60% because of its location on a flood plain, and 2) the building was and continues to be in desperate need of

repair rendering even the recent independent appraisal of $750,000.00 unrealistically high. On 11 July 1990 the Board of Tax Assessors informed the Foundation that they found the 1990 assessment to be valid.

The Foundation, still proceeding pro se, appealed next to the Board of Equalization. This resulted in only a minor reduction in the valuation of the property, from $1,623,500.00 to $1,466,700.00, saddling the Foundation with a tax bill for that year of $23,320.54. The opinion of the Board failed substantially to comply in form and substance with the Georgia law requirements for such an opinion. Thus, the Foundation appealed to the Superior Court of DeKalb County, Georgia.

According to the standard procedures in such appeals, the DeKalb County Attorney's Office filed the initial suit papers in the Superior Court, according to them as a service to the taxpayer. They did not send the Foundation a copy of the suit papers for over one year despite numerous requests. On 29 March 1991 the County Attorney filed a motion to dismiss, but the Foundation did not receive a copy of that motion until January of 1992 because it was missent. Nor did the Foundation receive any notice of the hearing on the motion to dismiss, as the only notice of the hearing was publicized in a local, DeKalb County newspaper to which the Foundation, with its principle office in Maryland, had no access. The hearing on the motion to dismiss took place on 8 April 1991, and the case was first dismissed because the Foundation had not complied with O.C.G.A. Sec. 48-5-29 (a) which provides that Superior Court will not assume jurisdiction of a tax appeal unless the contested taxes are prepaid, and secondarily on the basis of the Foundation's nonappearance at the hearing.

STAGE WHERE CONSTITUTIONAL ISSUE RAISED

The Foundation appealed the dismissal of its tax appeal by the Superior Court of DeKalb County to the Supreme Court of Georgia on Constitutional grounds. Due Process and Equal Protection issues were unambiguously raised by the Foundation in its Enumerations of Errors which accompanied its Appeal Brief and its Supplemental Appeal Brief, and those issues were developed in the Briefs. The Supreme Court of Georgia, without rendering an opinion, on 27 November 1991, affirmed the dismissal by the court below. The Foundation filed a timely Motion for Reconsideration, notifying the court of its intention to bring this matter before the United States Supreme Court if necessary, and requesting an opinion. Citing a Georgia Supreme Court Rule as authority for not providing an opinion, the Georgia Supreme Court denied the Motion for Reconsideration on 18 December 1991.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for a Writ of Certiorari because of the urgent need to remedy the deprivation of fundamental Constitutional rights caused by Georgia Statute O.C.G.A. Sec. 48-5-29(a) and similar legislation in numerous other states as applied to impoverished and/or non-profit real property owners.

Also, this Court needs to invalidate the Georgia Superior Courts' use of notice by publication to an out-of-state party whose address was well known to the court and parties, and in whose absence

dismissal with prejudice was the likely outcome. The basis for rejecting notification by publication in such circumstances has already been clearly established by this Court numerous times before, and the lower courts should not continue to ignore this Court's rulings.

This Court should take particular notice that the instant case is not attacking the rights of states to assess or collect taxes when due, nor the actual collection process. Rather, it is attacking a procedure which denies impoverished entities their due process rights to appeal. Therefore the customary reticent approach taken by this Court in its consideration of most state tax legislation is not appropriate in this case.

I. THE REQUIREMENT OF O.C.G.A. SEC. 48-5-29(a) THAT AGGRIEVED TAXPAYERS MUST FIRST PAY THEIR DISPUTED AD VALOREM PROPERTY TAXES BEFORE THE SUPERIOR COURT WILL ASSUME JURISDICTION VIOLATES IMPOVERISHED ENTITIES' CONSTITUTIONAL RIGHTS.

Georgia law O.C.G.A. Sec. 48-5-311(f)(1) provides that an aggrieved taxpayer may appeal a decision of the County Board of Equalization to the Superior Court in the county where the property lies. O.C.G.A. Sec. 48-5-29(a) sets forth the jurisdictional requirement which must be met before the superior court will entertain the tax appeal by requiring aggrieved taxpayers to pay the ad valorem property taxes assessed against the property at issue for the last year for which taxes were finally determined to be due on the property.

Petitioner's primary contention is that, under due process standards, the right of impoverished

and/or tax exempt entities to appeal their ad valorem property tax assessments should not be contingent upon prereview payment of the disputed tax bill. This contention is based on the fact that such entities often have a valid argument that the disputed assessment is incorrect - either too high, or, as in the case of this petitioner, all together improper. Yet, under prereview payment requirements, such as those in O.C.G.A. Sec. 48-5-29(a), when an impoverished taxpayer is not able to pay those taxes in a timely fashion, the right to bring that appeal is lost. The impoverished taxpayers inability to pay, subjects the property to a tax sale. This prereview payment requirement is doubly unfair to many taxpayers whose property is then sold for taxes, because even if the taxes are collected at a tax sale, the taxpayer is provided no post-collection review on the issue of improperly assessed taxes.

This Court has clearly established the requirement for Constitutional due process safeguards against unlawful tax exactions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S. Ct. 2238 (1990). The *McKesson* safeguards, which may be in the form of either prereview or post-review payments, are not met when prereview payment is not a realistic option for taxpayers. In theory, the prereview payment requirement can be remedied by post-review refunds. In practical application, however, the prereview payment requirement can result in devastating and disproportionate hardship for impoverished, aggrieved property owners who need to appeal their assessment and cannot first pay the contested taxes. Such was the situation which faced the Foundation in this case. The right to a judicial appeal should not be so heavily burdened that it is in essence precluded, thus causing irreparable harm to impoverished entities.

The *McKesson* safeguards need to be further defined by this Court to resolve the inconsistency in the protection of essential due process rights among the states in their treatment of ad valorem tax appeals, especially for entities which claim to be exempt. A partial survey by Petitioner found that Alabama, Arizona, California, District of Columbia, Florida, Massachusetts, Michigan, Ohio, Pennsylvania, South Carolina,and Texas have legislation requiring some form of prereview payment requirement for ad valorem tax appeals. Among those states which require prereview payment, New Jersey, Illinois, and Virginia seem to recognize the due process implications for certain impoverished taxpayers and so make an exception for tax exempt entities. Tennessee law seems particularly fair in requiring prereview payment only of the undisputed amount of the tax. Connecticut requires prereview payment when the tax is over $2,000. New York, North Carolina, Delaware, and Maryland do not require any prereview payment. Thus, the protection of essential Constitutional rights, which should be uniform, varies considerably among the states.

Impoverished taxpayers are particularly affected by the prereview payment requirement in the present depressed economic climate because the property often was assessed when property values were inflated, while now the property values have diminished substantially. However, the loss of tax income has made local governments almost rapacious in levying taxes. Never has the famous dictum, "The power to tax involves the power to destroy" been truer. Impoverished taxpayers have lost their right to appeal and most probably will lose their property if a tax sale ensues. This is particularly true where the mortgage on the property is accelerated if the taxes are not paid, allowing the mortgagor to proceed to sell the property. Such is the

situation for the Foundation in the instant case. This Court needs to reevaluate the standards necessary to protect taxpayers' Constitutional rights from abuse by tax hungry local governments. Only this Court can provide the needed guidance for the states in preserving the basic rights of the citizens of this country in these precarious economic times.

In the most disturbing turn of events, the Tax Equalization Board has said recently that it will not rule on the Foundation's tax exempt status, as the Georgia courts should decide that issue. Since the Georgia Courts will not entertain the tax appeal unless the Foundation pays the taxes which it is contesting and which it cannot afford to pay, a resolution of the Foundation's tax status is impossible until this Court rules that under traditional due process requirements the Foundation's appeal can proceed without the prereview payment of disputed taxes.

The loss of the right to appeal and the concomitant loss of one's property, the consequences of an impoverished taxpayer's inability to make the prereview payment, are not mere economic burdens, but rather devastatingly irreparable consequences which destroy basic economic rights. The resulting hardship for the noncomplying taxpayer is completely disproportionate to the state's valid interest in a sound fiscal policy and financial stability. The state's interests are already well protected by the state's statutory priority lien on the subject property and other protective measures are available to the state, such as substantial penalties for late tax payments. The delay in collection of revenue resulting from allowing for the appeal without prereview payment of disputed taxes is (to the extent that taxpayer does not prevail in its appeal) proportionately less burdensome for the state than the losses

caused to a noncomplying impoverished taxpayer under the operation of O.C.G.A. Sec. 48-5-29(a) - irreparable harm from the loss of the subject real property, a unique asset, which taxpayer will most likely never be able to afford to reacquire.

In the instant case, the Foundation is not the typical aggrieved ad valorem taxpayer attempting to have its assessment lowered; but rather, the Foundation by Georgia law is not a taxpayer at all, and is attempting to show the Court that it is entitled to the ad valorem tax exemption which the County had recognized for so many years. In the case of charitable entities such as the Foundation, the fiscal risk for the state is particularly minimal because such entities, which are not numerous, are not even taxpayers at all and should not be paying the ad valorem property taxes.

Under O.C.G.A. Sec. 48-5-29(a) only the wealthy can bring an appeal of their property tax assessment. The rest have to lose forever their right to a judicial appeal of the assessment and can anticipate losing their subject property in a tax sale. Thus, the analysis of Georgia Statute Sec. 48-5-29(a) does not warrant the traditional rational scrutiny test by which most tax legislation is reviewed, but rather warrants the strict scrutiny test, under which laws must be narrowly tailored or necessary to further a compelling state interest which cannot be otherwise protected, in order to pass Constitutional muster.

For the above reasons, amplified below, it is vitally important that the Court grant certiorari to resolve the far reaching, critical Constitutional issues presented by Petitioner in this case.

A.- O.C.G.A. SEC. 48-5-29(a) VIOLATES IMPOVERISHED ENTITIES' DUE PROCESS RIGHTS.

This Court recently recognized the Due Process implications of an improper tax exaction in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, et al*, 110 S. Ct. 2238 (1990). *McKesson*, a Commerce Clause case, addressed the Constitutionality of the excise tax scheme in the State of Florida which required taxpayers who failed to remit their taxes in a timely fashion to pay those taxes first before obtaining a review of the tax's validity. The Court in *McKesson* stated the following with regard to such prereview payments: "....a state must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause." *McKesson*, at 2238.

The Court went on to describe how a state might implement those safeguards:

> A state may do so either by providing a form of predeprivation process - e.g., by authorizing taxpayers to sue to enjoin imposition of the tax prior to its payment or to withhold payment and then interpose their objections as defenses in a state-initiated tax enforcement proceeding - or by providing retrospective relief as part of its postdeprivation procedure. *McKesson* , at 2241.

In *McKesson*, this Court found that the requirement for prereview payment of contested taxes was unobjectionable only if proper postdeprivation remedies existed. The predeprivation requirements were not under attack in *McKesson*, but rather the

failure to provide postdeprivation relief. The allowance of predeprivation requirements was dictum discussing the special circumstances in that case. The Court did consider, among other things, both the state's and the taxpayer's burdens in finding that the state did not have in operation a satisfactory scheme for postdeprivation relief.

Important facts and circumstances surrounding *McKesson*, where a predeprivation tax exaction might be acceptable only with due process safeguards, are clearly distinguishable from the Foundation's situation where prereview deprivation does not meet Constitutional standards. First, *McKesson* involved an excise tax assessment, that is, an assessment for tax monies which are at least partially, if not completely, due and owing to the state, and monies for which the state has no lien or other means to protect its economic scheme and its fiscal interests except to require prereview deprivation. Second, excise taxes are taxes which are intended to be imposed on entities which are in business for a profit and have a ready cash flow. Third, no irreparable harm would result to the Florida taxpayer in that case by providing postdeprivation remedies.

The Foundation's situation in the instant case, which is clearly distinguishable, emphasizes the absolute need for predeprivation safeguards. The only way to protect the Foundation's due process rights is through predeprivation safeguards. First, in the Foundation's case we are dealing with ad valorem property taxes, where the economic interest of the state is already well protected because of the state's lien on the property. Second, the Foundation is a nonprofit entity which is not in business to make money, and does not have abundant cash flow available to make prereview payments of the taxes it is contesting under its claim to entitlement

to an exemption. Third, postdeprivation remedies do not safeguard due process rights because the Foundation will suffer the irreparable harm of having its real estate sold. Fourth, the disputed funds in *McKesson* were state funds being collected by the business, similar to sales taxes, whereas ad valorem tax funds belong to the private entity until extracted by the government, similar to income taxes.

This Court has invalidated state tax legislation after considering the practical effect such state laws have on the due process rights of taxpayers. In *New Jersey Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950) this Court stated that its inquiry must involve consideration of the practical operation and effect of the tax legislation and found that the practical effect of the state tax in that case denied taxpayers their due process rights.

Likewise in this case, when the practical effects of O.C.G.A. Sec 48-5-29(a) are observed, Georgia's postdeprivation measures do not satisfy the Due Process standards set forth in *McKesson*, because for the Foundation, as for any other impoverished entity, prereview payment followed by postdeprivation relief is not a viable option. Prereview payment is impossible for the Foundation. The Foundation does not have the funds to pay the tax assessed, next bring its appeal, and then hope to qualify for postdeprivation relief. The Foundation is a nonprofit entity which is ready, willing and able to prove that by Georgia law the ad valorem tax assessment is in error, but it cannot afford to exercise its right to a judicial review under the requirements of O.C.G.A. Sec. 48-5-29(a).

Based on the logic in *McKesson*, and considering the practical effect of the operation of the Georgia law in the case of the Foundation, a predepriva-

tion safeguard in the form of judicial review of tax appeals without a prereview payment of taxes is the only acceptable safeguard for impoverished, non-profit entities contesting their ad valorem taxes, and O.C.G.A. Sec. 28-5-29 (a) should be stricken as unconstitutional.

B.- O.C.G.A. SEC. 48-5-29(a) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WHEN APPLIED TO IMPOVERISHED ENTITIES.

Although O.C.G.A. Sec. 48-5-29 (a) appears on its face to affect all taxpayers equally, in fact, in its application it is discriminatory. "A law nondiscriminatory on its face may be grossly discriminatory in its operation." *Williams v. Illinois*, 90 S. Ct. 2018, 399 U.S. 235 (1970). As applied, O.C.G.A. Sec. 48-5-29(a) discriminates against impoverished taxpayers that cannot afford to pay large tax claims before qualifying for a judicial appeal. This discrimination against impoverished taxpayers operates as a denial of their right to appeal and results in a loss of the subject property. This discrimination is clearly in violation of the Equal Protection Clause of the Fourteenth Amendment.

This Court has recognized the sanctity of the right to appeal many times. "Where a state provides appellate review, it cannot be granted to some litigants, and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Lindsey v. Norment*, 92 S. Ct. 862, 405 U.S. 56 (1972). In *Lindsey* the Court addressed the constitutionality of an Oregon State Forcible Entry and Wrongful Detainer Statute which required that a defendant who lost in the district court and wished to appeal had, inter alia, to give an undertaking with two sureties for payment of twice the rental of the

premises. This Court found that the statute arbitrarily discriminated against tenants wishing to appeal in heavily burdening the statutory right to appeal, and that the prepayment requirement was not necessary to effectuate the state's purpose of preserving the property at issue. As applied, O.C.G.A. Sec. 48-5-29(a) not only heavily burdens taxpayers' right to appeal, it totally deprives impoverished taxpayers of their right to appeal. This drastic result is not necessary to preserve the state's interest in the subject property because the state already has the benefit of its statutory priority lien on the property.

The operation of O.C.G.A. Sec. 48-5-29(a) results in further devastating ramifications for impoverished entities like the Foundation: in addition to being deprived of their right to appeal, they are subjected to the irreparable injury of the loss of their real property, a unique asset, through forced sales. Aggrieved impoverished property owners have no choice but to endure these irreparable injuries, while aggrieved wealthy property owners are merely burdened or inconvenienced by the prereview payment which they can afford. The impact of O.C.G.A. Sec. 48-5-29(a) and similar laws in other states on impoverished property owners raises serious due process and equal protection considerations, and runs contrary to the basic principle of fairness which is the very essence of our Bill of Rights.

While O.C.G.A. Sec. 48-5-29(a) discriminates on the basis of wealth, which by itself is not a suspect classification, the operation of this discriminatory statute so impacts taxpayers' basic right to appeal and thus their basic property rights, that analysis under the strict scrutiny test is appropriate. In *Speiser v. Randall*, 357 U.S. 513 (1958) this Court found due process procedures lacking in state actions to deny taxpayer's exempt status where tax-

payer's basic right of free speech was at stake. In *Speiser*, this Court stated that just because a case involves state taxing procedures with which Federal Courts are reticent to interfere, it does not follow that those ordinary state tax procedures are allowed to violate basic Constitutional rights. Similarly, in the case of the Foundation where the basic right to appeal and fundamental property rights are at stake, higher standards than those applied to ordinary tax assessment procedures (subjected usually only to the rational scrutiny test) are mandated.

In *Speiser* this Court has also declared, "In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly." *Speiser* at 526. Likewise, O.C.G.A. Sec. 48-5-29(a) in practical operation necessarily produces a result (eliminating the right of appeal for impoverished taxpayers) which it could not command directly. Pursuant to the strict scrutiny test which is called for on the instant case, a challenged law is considered invalid if it is not found to be demonstrably necessary to a compelling state objective and there does not appear to be a less restrictive means available. *Bernal v. Fainter*, 104 S. Ct. 2312, 467 U.S. 216 (1984). Clearly, O.C.G.A. Sec. 48-5-29 (a) fails under that analysis.

In *McKesson* this Court addressed the issue of the state's objectives and acknowledged the interest of the state in sound fiscal planning. However, the Court in *McKesson* also recognized that sound fiscal policy and financial stability cannot be implemented at the expense of the taxpayers' fundamental rights. In this case, Georgia's need for sound fiscal planning and financial stability are legitimate interests, but they must be accomplished in a fashion that does not deprive impoverished taxpayers unnecessarily of their property or their right to

appeal.

The prereview tax payment practice is not the only way for the state to assure financial stability and sound fiscal policy. For example, a penalty could be assessed for frivolous tax appeals, or the Tennessee method of requiring only that the undisputed portion of a tax bill be paid before review could be adopted. The prereview payment requirement is particularly illogical and objectionable when applied to entities which claim to be exempt and therefore are not likely to be paying taxes at all. Thus, several of the state laws which require prereview payment, including those in Illinois and New Jersey, provide exceptions from the prereview payment requirement for entities claiming tax exempt status.

This Court urgently needs to decide whether O.C.G.A. Sec. 48-5-29(a), as applied, is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States in intentionally discriminating against impoverished taxpayers while being neither the least restrictive nor the most expedient means of implementing and securing the state interest. At least, O.C.G.A. Sec. 48-5-29(a) should be more narrowly tailored to exclude exempt entities and entities claiming exempt status. Ideally, O.C.G.A. Sec. 48-5-29(a) and the similar laws in other states should be invalidated to the extent that their application would be likely to cause unnecessary irreparable harm to any aggrieved taxpayer.

II. NOTICE BY PUBLICATION OF COURT PROCEEDINGS, AS PERMITTED IN UNIFORM SUPERIOR COURT RULE 8.3, FAILS TO MEET DUE PROCESS STANDARDS FOR OUT-OF-STATE, PRO SE LITIGANTS WHOSE ADDRESSES ARE KNOWN.

The judicial tax appeal involved in this case was certified to the DeKalb County Superior Court on 22 January 1991. On 29 March 1991 the DeKalb County Board of Tax Assessors filed its Motion to Dismiss based on the Constructivist Foundation's noncompliance with O.C.G.A. Sec. 48-5-29(a). A hearing on the Motion to Dismiss was scheduled for 8 April 1991. Notice of the hearing was provided to parties only by means of publication in a local newspaper, apparently in compliance with Georgia State Uniform Superior Court Rule 8.3 which provides that the calendar clerk is to prepare the trial calendar, deliver it to the clerk of the court, and "distribute" or "publish" it in a sufficient period of time .....prior to the session of court at which the actions listed thereon are to be tried.

The Foundation first received its copy of this motion on 3 January 1992, as it had been mailed to an incorrect post office box number in Washington, D.C. The Foundation thus had absolutely no notice that a motion to dismiss had been filed until it received the order of dismissal in the mail on 1 May 1991. Likewise the Foundation had absolutely no notice that there was a hearing on the motion to dismiss scheduled for 8 April 1991, as the Foundation's principle offices are located in Maryland where there is no ready access to court dockets published in a local DeKalb County newspaper. At no time was any hint given to the Foundation that any official notifications would be made except by the direct communication by mail as had been done

repeatedly over four years. The hearing was held on 8 April 1991, in the absence of the Foundation, and the Motion to Dismiss was granted based on the Foundation's noncompliance with O.C.G.A. Sec. 48-5-29(a) and its failure to appear in court on that day.

The type of notice provided to the Foundation regarding the hearing of 8 April 1991 does not satisfy due process standards as clearly established by this Court. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated .....to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1949). The due process standard delineated in *Mullane* applies to the hearing notice on the motion to dismiss in the Foundation's case. A hearing on a motion to dismiss is unquestionably a "proceeding to which is to be accorded finality." What could be more final than a dismissal with prejudice? Yet, under no stretch of the imagination could notice by publication in a minor, local DeKalb County newspaper be considered "reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" in the Foundation's case. The Foundation, the party with the most at risk, i.e., dismissal, was located out-of-state, without ready access to local DeKalb County publications featuring DeKalb County court dockets. Clearly, notice by publication, as permitted in Georgia Uniform Superior Court Rule 8.3, does not satisfy the *Mullane* due process standard as applied to the facts and circumstances surrounding the obscure notice by publication in the Foundation's case.

Another case clearly in point, *City of New York*

v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293 (1953) further supports the Foundation's argument. In *New York* the Court held that notice by publication in a newspaper of a bankruptcy bar order requiring creditors to file their liens did not provide reasonable notice to New York City under the circumstances in that case. The notice by publication had been made pursuant to Sec. 77 (c) (8) of the Bankruptcy Act which provided that the "judge shall cause reasonable notice of the period in which claims may be filed,....by publication or otherwise."

In discussing the circumstances invalidating notice by publication in *New York*, this Court cited *Mullane* for the proposition that notice by publication, the justification of which is difficult at best, is a poor and sometimes hopeless substitute for actual service of notice, although necessity may cause a resort to publication when the names, interests and addresses of persons are unknown. *New York*, at 296, *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951). In *New York*, this Court found that no such necessity for notice by publication existed where the name, interest and address for the creditor, New York City, were well known. Likewise, in the instant case of the Foundation, the DeKalb County Superior Court, the DeKalb County Board of Tax Assessors, and the DeKalb County Attorney's office all knew very well who the Foundation was, what its interest was, and what its out-of-state address was because they all had been in constant communication with the foundation by mail for official notices and by telephone for informal contacts. No reasonable excuse, much less the necessity excuse as required by this Court, existed for notification of the Foundation solely by means of publication.

CONCLUSION

After *McKesson* many of the traditional considerations previously associated with the analysis of due process and equal protection issues arising out of state tax legislation have become obsolete. The prereview payment requirement as a condition precedent to a court assuming jurisdiction to entertain an appeal of an ad valorem tax assessment does not satisfy due process standards under *McKesson*, when applied to impoverished taxpayers or entities claiming exempt status.

A wide divergence presently exists among states in the manner in which these tax appeals are handled. Statutes like O.C.G.A. Sec. 48-5-29(a), which arbitrarily apply the prereview payment requirement to all taxpayers, including those claiming to be exempt, must be stricken. This Court needs to clarify the distinction between situations where prereview payment requirement of contested taxes is permissible as not being a violation of Constitutional rights, and those situations where, as in the case of the Foundation, a prereview payment requirement is unconstitutional.

The Superior Court of DeKalb County erred dismissing Petitioners case with prejudice on the basis of Petitioner's failure to comply with O.C.G.A. Sec 48-5-29(a) and failure to appear at a hearing for which the sole notice was an obscure item in a local DeKalb newspaper. The Supreme Court of Georgia erred in affirming the dismissal by the Superior Court, notwithstanding Petitioner's having raised before that Court an abundance of Constitutional objections to the Georgia tax appeal and Superior Court's notification procedures. For the various reasons cited above which have extensive impact

and are of critical importance, this petition for certiorari should be granted.

Respectfully submitted by

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Constructivist Foundation, Inc.

23 April 1992

APPENDIX

I. THE RELEVANT JUDGMENTS AND ORDERS APPEALED FROM ARE THE FOLLOWING:

A. LEE FOUNDATION, INC. v. DEKALB COUNTY BOARD OF TAX ASSESSORS; THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA:
CIVIL ACTION NO. 91-1646-4;
FINAL ORDER:

It is hereby ordered that this case is dismissed on the ground that the Superior Court does not have jurisdiction of the appeal due to Plaintiff's failure to comply with O.C.G.A. Sec.48-5-29(a). Additionally, this case is dismissed for want of production, as the Plaintiff did not appear at the call of the calendar on April 8, 1991 at 9:30 a.m.

Order signed 8th day of April, 1991 by Judge C. W. Hunstein.

B. LEE FOUNDATION, INC. V. DEKALB COUNTY BOARD OF TAX ASSESSORS; IN THE SUPREME COURT OF GEORGIA;
CASE NO. S91A 1225;
PER CURIAM:

Judgment affirmed without opinion pursuant to Rule 59. Clarke, C.J., Weltner, Bell, Hunt, Benham and Fletcher, J.J., and Judge Philip F. Etheridge concur; Smith, P.J., not participating.

Decided: November 27, 1991.

C. LEE FOUNDATION, INC. V. DEKALB COUNTY BOARD OF TAX ASSSESSORS; IN THE SUPREME COURT OF GEORGIA;
CASE NO. S91A 1225;
ORDER:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Clarke, C.J., Weltner, Bell, Hunt, Benham and Fletcher, J.J., and Judge Philip F. Etheridge concur; Smith, P.J., not participating.

Order passed December 18, 1991.

II. THE CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED ARE THE FOLLOWING:

U.S. Constitution, Amendment V :

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.Constitution, Amendment XIV, Section 1 :

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257 (a) (STATE COURTS; CERTIORARI) :

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

U.S.Supreme Court Rule 29.1 (FILING AND SERVICE OF DOCUMENTS; SPECIAL NOTIFICATIONS) :

Any pleading, motion, notice, brief, or other

document or paper required or permitted to be presented to this Court, or to a Justice, shall be filed with the Clerk. Every document, except a joint appendix or brief amicus curiae, filed by or on behalf of one or more corporations, shall include a list naming all parent companies and subsidiaries (except wholly owned subsidiaries) of each corporation. This listing may be done in a footnote. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document . If a list has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only amendments to the listing to make it currently accurate need to be included in the document currently being filed.

Georgia Statute O.C.G.A. Sec. 48-5-29 (a) (PAYMENT OF AD VALOREM PROPERTY TAXES CONDITION PRECEDENT TO SUPERIOR COURT JURISDICTION IN PROPERTY TAX LITIGATION) :

Before the superior court has jurisdiction to entertain any civil action, appeal, or affidavit or illegality filed under this title by any aggrieved taxpayer concerning liability for ad valorem property taxes, taxability of property for ad valorem property taxes, valuation of property for ad valorem taxes, or uniformity of assessments for ad valorem property taxes, the taxpayer shall pay the amount of ad valorem property taxes assessed against the property at issue for the last year for which taxes were finally determined to be due on the property.

Georgia Statute O.C.G.A. Sec. 48-5-311(f)(1): (REVIEW OF ASSESSMENTS; COUNTY BOARDS OF EQUALIZATION) :

(1) The taxpayer or, except as otherwise provided in this paragraph, the county board of tax assessors may appeal decisions of the county board of equalization to the superior court of the county in which the property lies. A county board of tax assessors may not appeal a decision of the county board of equalization changing an assessment by 15% or less unless the board of tax assessors gives the county governing authority a written notice of its intention to appeal and within ten days of receipt of the notice the county governing authority

by majority vote does not prohibit the appeal. In the case of a joint city-county board of tax assessors, such notice shall be given to the city and county governing authorities, either of which may prohibit the appeal by majority vote within the allowed period of time.

Georgia State Uniform Superior Court Rule 8.3 (TRIAL CALENDAR):

The calendar clerk shall prepare a trial calendar from the actions appearing on the ready list, in the order appearing on such list. The calendar shall state the place of trial and the date and time during which the actioins shall be tried. The trial calendar shall be delivered to the clerk of the court and distributed or published a sufficient period of time, but not less than 20 days, prior to the session of court at which the actions listed thereon are to be tried.

The Bankruptcy Act of 1935, Sec. 77(c)(8), 47 Stat. 1474, as amended, 49 Stat. 911, 11 U.S.C. Sec. 205, (repealed):

The judge shall cause reasonable notice of the period in which claims may be filed ....by publication or otherwise.

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